

11/26/2003



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 8

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1765014 - R8 SDMS

November 26, 2003

Ref: 8ENF-L

Eric James Heil, Esq.
P.O. Box 189
Rico, CO 81332

Dear Eric:

The purpose of this letter is to respond to your October 31, 2003 e-mail, and to clarify EPA's objectives for the area in and around Rico, Colorado. Additionally, this letter addresses the harsh tone of your e-mail, which is inconsistent with the positive relationship that I and others at EPA have established with you over the last 2-3 years. No one at EPA has ever interacted with you in anything but a professional manner, and our discussions have always been open, professional, courteous and intended to positively address the threats to human health and welfare and the environment in and around the Town of Rico. Hopefully, the sentiment you express will not prevent us from moving forward in a productive fashion to investigate and address those threats.

In your e-mail, you first commented on the notification I provided to you at the meeting on October 30, 2003 at Davis, Graham and Stubbs, regarding plaintiffs' impending intent in U.S. and State of Colorado v. Rico Development Corporation et al., Civil Action No. 99-MK-1386, to move the District Court to enter the Consent Decrees that plaintiffs previously lodged. My notification to you in this regard was done as a professional courtesy. You stated that you were really disappointed to learn "that none of the Town's comments concerning the RDC/Webster/Sell Consent Decrees were given serious consideration." Contrary to your assertion, the United States and the State spent considerable time fairly and objectively evaluating the comments that you previously submitted on behalf of the Town, as well as the virtually identical comments submitted on behalf of the Dolores Water Conservancy District. Thus, the United States and the State of Colorado believe that the settlements, as lodged, are fair, reasonable, and in the public interest and achieve, as much as possible, all of the goals expressed in your comments. Our reasons for so concluding are set out in detail in the Memorandum of Points and Authorities that will accompany the Motion to Enter requesting the court to enter the Decrees.



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In the portion of your e-mail that addresses the Consent Decrees, you state that "[i]f the Consent Decrees are approved in the current form as you said yesterday you should expect a serious change of sentiment of the Town Board with regard to the role of the EPA in Rico." As EPA has made clear in all of our interactions with you, the Town Board, Ashton Harrison and the residents of Rico, EPA's goal with respect to Rico is to work cooperatively with the Town and the State of Colorado to ensure that threats to human health and welfare and the environment are detected promptly and addressed appropriately. We know that you and the Town Board share that goal, and it is our hope that your judgment regarding our conclusions with respect to the Consent Decrees will not interfere with our mutual efforts to achieve that goal.

You also state that I and/or EPA have not been up-front about the scope of a Superfund designation. You go on to state that the "Town never asked for soils samples or raised lead issues as a concern - Town has always focused concern on the St. Louis Tunnel and sought to promote a voluntary clean-up plan." You then inquire as to whether the interest expressed in sampling the Town streets was a result of my personal involvement since, as you state, it was not within the scope of the START2 sampling plan.

First of all, every EPA employee has always fully informed you and the Town Board about EPA's plans in the area. When you, on behalf of the Town Board, requested that EPA conduct an emergency removal action in early 2000 to address the deteriorating uppermost settling pond, we responded immediately and kept you and the Town Board fully informed of our actions prior to, during and after completing our emergency response action. When representatives of EPA and the Colorado Department of Public Health and Environment came to Rico on August 27 of this year to advise you, the Town Board, and the citizens of Rico that EPA was planning to come to Rico shortly to collect samples to evaluate the area under the Hazard Ranking System in the National Contingency Plan, we had only days before concluded that the sampling was an appropriate course of action. EPA has continually endeavored to be open and forthcoming in our discussions with residents and representatives of the Town of Rico and we will continue to do so in the future. EPA has no secret agenda regarding Rico. As EPA representatives have expressed to you and others in the past, EPA has no current plan to list the area in and around Rico on the National Priorities List under the authority provided pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act. Any change in those plans would be the result of full, comprehensive and informed discussions with you, the State of Colorado and the Town Board.

With respect to your comment that the Town has neither raised lead contamination as an issue nor asked that soil samples be taken, I'm sure that you don't mean to imply that the Town Board and the citizens of Rico are not interested in knowing whether their property is contaminated with lead or whether Silver Creek and the Dolores River have excessive levels of metals or other contaminants that may pose a risk to the public health or welfare or the



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environment. The threats posed by the ingestion of lead by individuals, particularly children, are now sufficiently recognized such that there can be no question that those threats must be investigated and appropriately addressed. At the Town meeting on August 27, 2003, EPA staff advised the attendees that the limited samples that had thus far been collected in residential areas had indicated the presence of elevated levels of lead. This, in large part, prompted our decision to recently conduct a more in-depth sampling effort in residential areas, as well as in and around the Silver Creek and Dolores watersheds, and a large percentage of the Rico community gave EPA access to their properties to sample soil for lead.

While our focus in the past few years has been the St. Louis Tunnel discharge, we cannot ignore the additional threats that have recently been brought to light. Although you state that the Town has always sought to promote a voluntary clean-up plan for the St. Louis Tunnel discharge, your statement is a reversal of prior Town policy, as expressed to EPA. Less than a year ago, you advised me via letter dated November 20, 2002, that the Town Board had adopted a resolution stating that:

The Board of Trustees hereby supports continued action by federal and state agencies to enforce compliance with the Clean Water Act and the Colorado Water Quality Control Act, to seek penalties and fines for past willful violations of the discharge permit requirements, and to use CERCLA and Superfund authority as necessary to expedite re-institution of adequate treatment of the St. Louis Tunnel Adit.

In your letter, you stated:

In addition, it has been my understanding from previous conversations that the federal government was intending to pursue settlement with potentially responsible parties, including ARCO and NL Industries, under the authority of CERCLA. The Town hereby requests that CERCLA enforcement be formally and officially initiated. Town believes it is important that any potential settlement for the water quality violations comes under the clear authority of federal environmental regulations to minimize the potential for re-occurring non-compliance or abandonment of the treatment system in the future.

You went on to invite EPA and state officials to visit Rico to discuss, among other things, the Superfund process and then stated that the Town would contact its state and federal legislators to request their support for federal and state attention to the on-going water quality violations in the area. As noted above, EPA and state officials came to Rico in August of this year to discuss, among other things, the issues raised in your November 20, 2002 letter. As to the requests by you and the Town Board that EPA use its CERCLA enforcement authority "to expedite re-institution of adequate treatment of the St. Louis Tunnel Adit" and "to minimize the potential for



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re-occurring non-compliance or abandonment of the treatment system in the future," that is what EPA has been working toward, as most recently detailed in the meeting you and I attended on October 30, 2003 at the offices of ARCO's counsel. For you to question the use of the very authority you and the Town Board previously specifically requested that EPA employ, was, to say the least, surprising.

Regarding your inquiry whether the interest expressed in sampling the Town streets was a result of my personal involvement, since as you say such sampling wasn't in EPA's START2 sampling plan, the answer is no. In fact, I had not read the START2 sampling plan prior to the commencement of sampling pursuant to the plan. I became aware of the desire to sample some of the unpaved streets in town when the START2 contractor contacted me after being denied permission to take those samples by Town representatives. I contacted you to ask that you facilitate that permission, and you told me you would raise the issue that evening with the Town Board. EPA's contractor was advised the next morning by the Town Manager that the Town Board had decided not to grant permission to sample the streets. EPA's desire to sample the unpaved streets is to determine whether those streets contain hazardous mine waste tailings. If they do, the constant erosion due to wind, rain and snow may present a threat to the public health or welfare or the environment. Hopefully, the Town Board and EPA will be able to more fully discuss each other's concerns and reach agreement on this issue.

Finally, you also state that I have a personal anti-environmental agenda that is indifferent to the interests of the Town of Rico and that is intended to sabotage the progress that Rico has made over the years. Contrary to your assertions, I have worked extremely hard over the last few years to help resolve the environmental problems that have plagued the Town. The Rico Development Corporation ("RDC"), and ARCO before it, regularly violated the terms of the discharge permits they held for nearly 20 years for the discharge from the St. Louis Tunnel into the Dolores River. Likewise, for years the untreated discharge from the Blaine Adit was completely unaddressed. After repeated, unsuccessful efforts by the state to bring these entities into compliance, the United States, joined by the state as a plaintiff, filed suit against RDC and its shareholders. While you may not agree with the terms of the settlements that have been reached in the litigation against those parties, there would have been no recovery of badly needed funds had the litigation not been commenced. Similarly, it is extremely unlikely that ARCO would have ever rehabilitated the plug in the Blaine Adit or initiated any effort to resolve the St. Louis Tunnel discharge had EPA not been involved. EPA management views these efforts as necessary and appropriate in light of the history of inaction regarding the St. Louis Tunnel discharge and other potential environmental problems in and around Rico. EPA has a responsibility under the law to protect the public health and welfare and the environment. Although EPA will work closely with the state and the Rico community to undertake that responsibility, we will not abdicate it.



We at EPA look forward to continuing to work with you and the Town Board in a positive, cooperative fashion as we all seek to address the ongoing threats to public health and welfare and the environment in an expeditious and appropriate manner.

Sincerely,

- S -

Sheldon H. Muller
Enforcement Attorney

cc: Town of Rico Board of Trustees
Max Dodson - 8EPR
Carol Rushin - 8ENF



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